IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

No. 78-6829

EDDIE GORDON,

Petitioner,

-against-

NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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Of Counsel

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

The petitioner, Eddie Gordon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered February 5, 1979, affirming a judgment of the Supreme Court, Kings County, rendered on July 29, 1977, convicting him of manslaughter in the first degree [New York Penal Law §125.20 (McKinney, 1975)] and sentencing him to an indeterminate term of imprisonment with a minimum of eight and one-third years and a maximum of twenty-five years.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department is not yet officially reported and is unoffically reported at 413 N.Y.S.2d 29 (1979). The order of affirmance and opinion are annexed as Appendix A. The opinion of the Supreme Court, Kings County on the motion to suppress is not reported and is set forth as Appendix C.

JURISDICTION

The judgment and the order of the Appellate Division was entered on February 5, 1979. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Jacob D. Fuchsberg on March 19, 1979. A copy of the certificate denying leave to appeal to the Court of Appeals

is annexed as Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the warrantless arrest of petitioner within a private dwelling and the seizure of a gun from beneath a mattress incident to that arrest deprived petitioner of his rights under the Fourth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV.

STATMENT OF THE CASE

As early as December 15, 1976, petitioner was a suspect in the homicide of a James Lawrence and in the attempted homicide of one Ignacia Torruella. On that date Mr. Torruella made a photographic identification of petitioner, and the police learned not only petitioner's name but also what neighborhood he frequented.

Petitioner had been living for a few days with his common-law wife, Diane McMoore, and their daughter in a Brooklyn brownstone. On December 21, 1976, Ms. McMoore's mother, who lived elsewhere, telephoned the police to inform them of petitioner's whereabouts. Within five minutes after the call, a contingent of police officers and detectives proceeded to the premises. Four detectives entered the building while others remained outside to insure against petitioner's escape.

When the detectives reached the apartment they knocked on the door and identified themselves. They heard a woman answer, "Just a moment," and heard the sounds of "milling around." After a few moments, the detectives knocked and once more announced, "Police." When there was no response, they broke down the door. They had not obtained either an arrest or search warrant.

With their guns drawn, the four detectives entered the apartment. Two detectives, moving toward the front of the apartment, discovered petitioner, dressed only in his underwear, in a closed closet. After frisking petitioner, the police placed him under arrest, told him to dress, and then accompanied him to the bedroom at the front of the house. Then, just before petitioner sat on the bed to put on his socks, a policeman lifted the mattress and found a gun.

On December 28, 1976, petitioner was indicted by a Kings County Grand Jury for murder, attempted murder and criminal possession of a weapon.

Defense counsel moved to suppress the gun on the ground, inter alia, that the police entry, without a search warrant or an arrest warrant, was improper. The hearing court found that the police had probable cause both to arrest petitioner and to search his wife's apartment. It ruled that probable cause was based on the photographic identification by Mr. Torruella, the telephone call from Ms. McMoore's mother, and the fact that after announcing their arrival the police had to wait outside Ms. McMoore's door as they heard "sounds of milling around" from within the apartment. In view of the seriousness of the crimes under investigation, the court held that the actions of the police were reasonable and the arrest lawful. Consequently, it denied the motion to suppress. (App. C at pp. 2-4).

On June 30, 1977 petitioner entered a plea of guilty to manslaughter in the first degree, to cover the entire indictment, and on July 29, 1977 the court sentenced petitioner to an indeterminate prison term with a minimum of eight and one-third years and a maximum of twenty-five years.

Because petitioner's plea of guilty did not waive his Fourth Amendment claim [New York Criminal Procedure Law §710.70(2)], he appealed the denial of his motion to suppress. On February 5, 1979 the Appellate Division, Second Department affirmed his conviction on the authority of People v. Payton, 45 N.Y.2d 300 (1978)(App. A). Leave to appeal to the Court of Appeals was denied on March 19, 1979 (App. B).

REASONS FOR GRANTING THE WRIT

The warrantless arrest of petitioner in a private dwelling in which he was lawfully present violated the Fourth Amendment and raises the same constitutional issue as is before the Court in Payton v. New York, No. 78-5420 and Riddick v. New York, No. 78-5421, set for reargument during the October, 1979 Term. In affirming petitioner's conviction, the Appellate Division relied on the majority opinion of the Court of Appeals in Payton. App. A, p. 2. It is thus respectfully submitted that this case be held in abeyance until those cases are decided.

The circumstances surrounding petitioner's arrest are similar to those in Payton. In each case the police broke down the door to a home to effect a warrantless arrest. In Payton, the police made the warrantless entry the morning after the defendant was identified as a suspect in a homicide case. At the time of petitioner's arrest, however, the police had had probable cause for his arrest for almost a week. There was also no showing that exigent circumstances existed which would justify a failure to obtain a warrant.

CONCLUSION

This case should be held in abeyance pending the Court's decision in Payton v. New York, No. 78-5420 and Riddick v. New York, No. 78-5421 and should be disposed of in accordance with the outcome of those cases.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Petitioner

MARTHA L. CONFORTI
Of Counsel
June, 1979

ORDER AND OPINION OF THE APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 5, 1979

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,
HON. CHARLES MARGETT,
HON. M. HENRY MARTUSCELLO. } *Associate Justices*

The People of the State of New York.

Respondent.

v.

Eddie Gordon,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Eddie Gordon,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered July 29, 1977, convicting him of manslaughter in the first degree, upon his plea of guilty, and imposing sentence; the appeal also brings up for review the denial of defendant's motion to suppress certain physical evidence;

and the said appeal having been submitted by Martha L. Conforti, Esq., of counsel for the appellant, and submitted by Suzan Picariello, Esq., of counsel for the respondent, and due deliberation having been had thereon: and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division

E/ms

MILTON MOLLEN, P.J.
VINCENT D. DAMIANI
CHARLES MARGETT
M. HENRY MARTUSCELLO, JJ.

_____ AD2d _____ S January 23, 1979

46 E

The People, etc., respondent,
v. Eddie Gordon, appellant.
(Ind. No. 4037/76)

William E. Hellerstein, New York, N.Y. (Martha L. Conforti of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Suzan Picariello of counsel; Adrian Mecz on the brief), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County (BARSHAY, J.), rendered July 29, 1977, convicting him of manslaughter in the first degree, upon his plea of guilty, and imposing sentence. The appeal also brings up for review the denial of defendant's motion to suppress certain physical evidence.

Judgment affirmed.

The record shows that at the suppression hearing defense counsel either conceded the identity and reliability of the telephone caller who informed the police of defendant's address, or waived the potential issue with respect thereto. The police had probable cause to enter the apartment where the defendant was found and arrested and, under the circumstances, did not violate defendant's constitutional right to be secure from unreasonable searches and seizures (see People v Payton, 45 NY2d 300). The motion to suppress physical evidence was thus properly denied.

We have considered the other contentions raised by defendant and find them to be without merit.

MOLLEN, P.J., DAMIANI, MARGETT and MARTUSCELLO, JJ., concur.

CERTIFICATE DENYING LEAVE TO THE NEW YORK COURT OF APPEALS

State of New York
Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

EDDIE GORDON

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 19, 19 79

Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division, Second Department dated February 5, 1979 affirming judgment of Supreme Court Kings County rendered July 29, 1977.

APPENDIX C

DECISION OF THE SUPREME COURT, KINGS COUNTY

BARSHAY, J.

Defendant has been indicted for felony murder. He now moves to suppress the tangible evidence, a gun. A hearing was held before this court and based upon the evidence adduced at the hearing, the following are the findings of fact and conclusions of law:

On or about December 15, 1976, Detective Arthur Walsh, from the 12th Homicide Zone, was assigned to investigate the death of James Lawrence, who died as the result of a gun shot in the back of the head. Upon being assigned to the case, Detective Walsh had a conversation with Ignacia Torruella on December 15, 1976 at Brookdale Hospital. Mr. Torruella was a gun-shot wounded victim of the crime in which Mr. Lawrence was shot to death. Detective Walsh showed Torruella a number of photographs, among which there was included a picture of the defendant. Torruella identified the picture of the defendant as being the person who shot him. Torruella also told the detective that the defendant's street name was "Eddie" and that he had known him for about one year.

On December 21, 1976 Detective Walsh received a telephone call from the mother of Diane McMoore, defendant's common-law wife, who stated that the defendant was in an apartment located at 2989 Fulton Street, Brooklyn, New York. Walsh, without a search or arrest warrant, proceeded to that address with approximately seven other police officers. He knocked on the door of the apartment and identified himself and his colleagues as police officers. They were told by a female voice to wait one minute. After waiting a few minutes, the police officers heard some milling around inside the apartment. They again knocked on the door and hearing no response, they broke down the door and entered the apartment.

Upon entering the apartment, the officers observed the defendant, dressed in his underwear, inside a closet whose door was open. The officers identified the defendant as the man they were looking for, after looking at the picture they had in their possession that Mr. Torruella previously picked out. At this point defendant was placed under arrest and told to get dressed.

The officers accompanied the defendant into an adjoining bedroom and told him to put on his clothes which were next to the bed. Before the defendant sat down on the bed to put on his socks, a Detective Jacobson told him to wait as Jacobson proceeded to lift up the mattress because he "wanted to make sure it was safe" (hearing minutes, p. 66). Jacobson flipped the mattress and found a gun.

Defendant now contends that the seizure of the gun violated constitutional demands because it was not within the area from which the police officers "might obtain weapons or evidentiary items" as prescribed by Chimel v. California (395 U.S. 752). He further maintains that the entry into the apartment was unconstitutional because it was accomplished without a search or arrest warrant and without probable cause to believe that he was in the apartment. This court finds that defendant's arguments are completely devoid of merit.

The admissibility of evidence seized in a search incident to an arrest depends on the lawfulness of the arrest (People v. Floyd, 26 N.Y.2d 558). It is well settled that an arrest made without a warrant, as is the case here, is lawful provided there is the existence of probable cause to make the arrest.

The basic test of probable cause to arrest is the amount of information possessed by law enforcement officers at the time of the arrest (see Beck v. Ohio, 379 U.S. 89). "The substance of all the definitions of probable cause is a reasonable ground for a belief of guilt * * * and this means less than evidence which would justify condemnation or conviction * * *. Probable cause exists where the facts and circumstances within * * * [the officers'] knowledge, and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (Brinegar v. U.S., 338 U.S. 160, 175).

In determining whether probable cause existed to arrest the defendant herein, the court must first take into account the police officers' conduct leading to the arrest. A review of the record shows that the police had reasonable cause, prior to their entry, to search the apartment located at 2989 Fulton Street, Brooklyn, New York, without a warrant: First, they were able to obtain a photographic identification of the defendant from one of the victims of the crime. Second, they received a telephone call from the mother of the defendant's common law wife, informing them that defendant could be located at the Fulton Street address. Third, upon arriving at the apartment and announcing their presence, the officers were forced to wait outside a few minutes during which time they heard sounds of milling around inside the apartment. The totality of the circumstances present herein leads this court to find that the facts available to the police officers at the time of their entry into the apartment would warrant a person of reasonable caution in believing that the action was appropriate. There was nothing unreasonable about this type of police response considering the seriousness of the crime under investigation.

The arrest of the defendant followed the police officers' entry into the apartment. Upon entering, the officers observed defendant inside an open closet. After comparing the defendant to the photograph that Mr. Torruella earlier picked out in identifying the defendant, the officers determined that the defendant was the suspect they were looking for. It was at this point, that the amount of information possessed by the police officers rose to the level of probable cause to arrest the defendant. Thus, although the arrest was without a warrant, the court finds that it was lawful.

Where there exists a lawful arrest, a valid warrantless search may be made as an incident thereof. The justification for this search power and the limitations on its exercise were set forth in Chimel v. California, supra. In this case the Supreme Court held that the incidental search is limited to the arrestee's person and to the area within his immediate control. The court stated that"[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or to effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. * * * There is ample justification, therefore, for a search of the arrestee's person and the

area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon * * *." (Chimel, pp. 762-763).

In the instant case, defendant, who was already placed under arrest, was about to sit down on the bed when Detective Jacobson flipped the mattress and discovered the gun. This search was reasonably limited by the need to seize weapons and to prevent the destruction of evidence. There was no search of the whole apartment. The only search that occurred was under the mattress - a mattress that the defendant was standing right next to. The scope of the search was, therefore, reasonable under the Fourth and Fourteenth Amendments.

Clear and convincing evidence of probable cause to arrest the defendant without a warrant was present and the search that took place as an incident thereof was lawful.

Accordingly, defendant's motion to suppress the tangible evidence, a gun, is denied.

/s/ HYMAN BARSHAY
J.S.C.

78-6839

In the

SUPREME COURT OF THE UNITED STATES

1978 Term

No. 78-

EDDIE GORDON,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review the judgment of the Supreme Court, Kings County rendered on July 29, 1977, convicting him, upon his plea of guilty, of the crime of Manslaughter in the First Degree and sentencing him thereon to a term of imprisonment of eight and one-third to twenty-five years. The Honorable Hyman J. Barshay presided at trial and imposed sentence.

OPINIONS BELOW

The Appellate Division of the Supreme Court of the State of New York affirmed the judgment of conviction in an opinion

unofficially reported at 413 N.Y.S.2d 29 (1979). On the 19th of March, 1979, leave to appeal to the Court of Appeals was denied by the Honorable Jacob D. Fuchsberg, Associate Judge. (46 NY2d 1080) The written opinion of the Supreme Court, Kings County is not reported.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Under the circumstances of this case, where petitioner was identified six days before as the perpetrator by the only live victim of the shooting, where information was received approximately an hour and a half before the arrest that the petitioner was finally located at a specific address and where the police officers were denied entry to that premises after they identified themselves, were these officers, having probable cause to arrest, justified in forcibly entering the apartment without a warrant to effect petitioner's arrest and to seize the gun hidden under the mattress in that apartment as incident to that arrest.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV

STATEMENT OF THE CASE

EDDIE GORDON, petitioner herein, was accused by Kings County Indictment Number 4037/1976 of the crimes of Murder in the Second Degree (2 counts, felony and common law),

Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree, it being alleged that in the early morning hours of December 15, 1976, petitioner and two others unlawfully entered the apartment of Ignacia Torruella and forcibly stole property from both Torruella and one James Lawrence. In the course of the commission of the this crime, Torruella and Lawrence were both shot in the head as they lay tied up on a bed. Lawrence died of his wounds that same day; Torruella was hospitalized and eventually recovered.

On June 28, 1977, a hearing was held on petitioner's motion to suppress the gun found hidden under the mattress during the limited search conducted incident to his arrest.

Detective Arthur Walsh, assigned to the 12th Homicide Zone, testified that, on December 15, 1976, he was called to investigate the homicide of one James Lawrence. In the course of this investigation, he went to Brookdale Hospital on December 15th to interview one Ignacia Torruella who had been shot in the head along with James Lawrence. Torruella was shown a series of photographs and identified Eddie Gordon as the man who had shot him by picking his photo from a photographic display. He informed Detective Walsh that he knew Gordon approximately one year by his "street name" Eddie. Torruella related that petitioner and others had entered his apartment, bound him and Lawrence, searched the apartment and that afterwards Gordon returned and shot the deceased and Torruella. After his conversation with Torruella, Walsh

commenced the effort to locate Eddie Gordon.

On the morning of December 21, 1976, Detective Walsh received a phone call from the mother of one Diane McMoore. She informed him that Eddie Gordon was at her daughter's apartment, located at 2989 Fulton Street in Brooklyn. Walsh, accompanied by Sergeant Lanzetta, and Detectives Jacobson and Lasky immediately proceeded to Ms. McMoore's apartment. They knocked on the door and identified themselves as police officers. A female voice responded and told the officers to wait. They did so and, while standing outside, heard the sounds of milling around from inside the apartment. After a pause, the officers knocked and identified themselves again. Receiving no response, the door was pushed in.

After entering the apartment, the detectives moved towards the front of the house. Eddie Gordon was found in a closet wearing only his undershorts. He was informed that he was under arrest and was told to get dressed. Petitioner and the detectives went into the bedroom where his clothes were lying on the floor next to the bed. As Gordon was about to sit down on the bed and put on his socks, Detective Jacobson ordered him to stop, flipped the mattress and found the gun.

The defense produced two witnesses, Eddie Gordon and Diane McMoore, who recounted their versions of the arrest. At the conclusion of the hearing, petitioner's motion to suppress the gun was denied by the court. In a detailed opinion, the court concluded that there was clear and convincing evidence of probable cause to arrest petitioner

without a warrant and the ensuing limited search was lawful as incident to a valid arrest.

After the court's decision on petitioner's suppression motion, Eddie Gordon offered to plead guilty to Manslaughter in the First Degree to cover the entire indictment. During the course of his allocution, petitioner admitted entering Mr. Torruella's apartment armed with a gun. He informed the court that he was prepared to shoot anyone who might have arrived at the apartment during the robbery. Gordon admitted that both victims of the robbery were shot during the course of the crime and that he left the apartment "on the assumption they were dead". Thereafter, the plea was accepted.

On July 29, 1977, petitioner appeared before the court for sentencing. At that time, the court indicated that it had read the probation report thoroughly. Following statements by both counsel, the court sentenced Eddie Gordon to a minimum of eight and one-third years imprisonment and a maximum of twenty-five years.

The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and leave to appeal to the Court of Appeals has been denied. Petitioner now seeks a writ of certiorari to review the question of whether considering the existence of probable cause and the exigent circumstances, the police officers' actions in entering an apartment where he was staying without a warrant was a violation of his rights under the Fourth and Fourteenth Amendments.

ARGUMENT

THE COURT BELOW CORRECTLY CONCLUDED THAT THE POLICE HAD PROBABLE CAUSE TO ENTER THE APARTMENT WHERE PETITIONER WAS FOUND AND ARRESTED AND THAT THE EXIGENT CIRCUMSTANCES PRESENTED HEREIN JUSTIFIED THIS COURSE OF ACTION DESPITE THE ABSENCE OF A WARRANT. THERE BEING NO SUBSTANTIAL FEDERAL QUESTION TO BE RESOLVED, CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Petitioner's challenge to the legality of his arrest and the subsequent seizure of the gun raises the issue of whether a police officer who has probable cause to arrest and who, additionally has received information that a sought after suspect is at a specific location, may forcibly enter that premises after being denied entry to effect an arrest without a warrant. While respondent recognizes that under certain circumstances the warrantless intrusion into a home to effect an arrest may violate a suspect's Fourth Amendment rights (see, e.g., United States v. Reed, 572 F.2d 412 [2d Cir. 1978]; United States v. Jarvis, 560 F.2d 494 [2d Cir. 1977], cert. denied, 435 U.S. 934, [1978]), the case at bar is not such a case.

It is beyond cavil that the perimeters of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest" (Gerstein v. Pugh, 420 U.S. 103, 113 n.13 [1975]) have yet to be precisely defined by this Court. United States v. Santana, 427 U.S. 38 [1976]; United States v. Watson, 423 U.S. 411 [1976]; Coolidge v. New Hampshire, 403 U.S. 443 [1971]). Nonetheless, it is equally uncontested that this Court would not invalidate

an arrest based upon probable cause for the sole reason that the law enforcement official did not obtain a warrant. (Gerstein v. Pugh, supra, 420 U.S. at 113; Ker v. California, 374 U.S. 23 [1963]; Draper v. United States, 358 U.S. 307 [1959]). Nor would this Court void an arrest where exigent circumstances made a warrantless entry the only reasonable means of effecting such arrest. (United States v. Santana, supra; Warden v. Hayden, 387 U.S. 294 [1967]). It is precisely within these already well-recognized exceptions to the warrant requirement that the factual pattern presented herein fits.

Although in the absence of a United States Supreme Court pronouncement, "the law of the state where an arrest without warrant takes place determines its validity" (United States v. Di Re, 332 U.S. 581, 589 [1948]; See also United States v. Watson, supra, 423 U.S. at 420 n.8), even when considered without the benefit of the rationale of People v. Payton, and People v. Riddick, (45 NY2d 300, 408 N.Y.S.2d 387, 380 N.E.2d 217 (1978); probable jurisdiction noted sub nom. Payton v. New York and Riddick v. New York, ___ U.S. ___, 99 S.C. 718 (1978) Nos. 78-5420, 78-5421), under the well-established exception of exigent circumstances, the police conduct in the instant case clearly passes constitutional muster.

In the case at bar, the detectives were investigating the commission of a violent murder. On the day of the incident, the sole remaining victim of the shooting conclusively identified the petitioner as the person who shot him and

killed James Lawrence. Armed with the information that the perpetrator was named Eddie and came from the East New York area of Brooklyn, the police began an unfruitful search for his location. At approximately 9:00 a.m. on the twenty-first of December, six days after the identification, Detective Walsh received a tip from a highly reliable source that the Eddie Gordon was at 2989 Fulton Street in Brooklyn. Within a hour and a half after the receipt of this information, a detail of officers was present at the Fulton Street address. The officers knocked and identified themselves twice. Receiving no response the second time, they forcibly entered the apartment where petitioner was found in the closet.

As an aid in determining whether the circumstances are sufficiently compelling to necessitate a warrantless intrusion in the home, the District of Columbia Circuit has listed a number of factors gleaned from this Court's decisions to be considered when evaluating the constitutionality of a warrantless arrest. Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970). These considerations, recognized and adopted by five other circuits, include:

> ...commission of a grave offense, belief that the suspect is armed, probable cause to believe the suspect has committed the crime, suspicion that suspect is on the premises, likelihood of escape if delay ensues, and peaceful entry by the police. United States v. Jarvis, 560 F.2d 464, 498 (2d Cir. 1977).

See also, Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

All of the cited considerations were present in this

case but one. A grave offense was obviously involved here and there was also a strong belief that petitioner was armed. As conceded by petitioner in the courts below, there was probable cause to believe that he had committed the crime. There was a strong suspicion that Gordon was at the premises to be entered and a strong likelihood that he would leave the apartment and continue to elude the police were any delay to ensue. The only consideration not present was that of a peaceful entry. When viewed in the totality of circumstances, however, the manner of entry was eminently reasonable. The police announced their identity at the door and were told to wait. During the period of waiting, they heard sounds of milling about inside the apartment. Considering the likelihood of the suspect being armed, the forcible entry was reasonable. Any further delay would have enhanced the possibility of a shootout with serious injuries to those within and without the apartment.

Moreover, the officers went to 2989 Fulton Street with the sole intent of effecting a felony arrest. No general search of the premises was intended nor was one undertaken. The only seizure of property was the result of a search incident to a lawful arrest. Clearly, once petitioner sat on the bed, anything hidden therein was obviously within the "grabbable" area and under these facts, the officers were entirely justified in conducting this limited search for their own safety. (Chimel v. California, 395 U.S. 752 [1969]).

Although not the classic "hot pursuit" situation (See Johnson v. United States, 33 U.S. 10 [1948], nevertheless,

the factual situation presented herein is tantamount to the type of exigency justifying immediate police action without a warrant. (See United States v. Santana, supra; United States v. Price, 345 F.2d 256 [2d Cir. 1965]); People v. Hodge, 44 NY2d 553, 406 N.Y.S.2d 268, 377 N.E.2d 721 [1978]). The circumstances in the case at bar do not raise the more difficult issue presented to this Court in Payton and Riddick, namely whether a police officer who has probable cause to arrest may enter the home of the suspect to effect the arrest in the absence of exigent circumstances. Accordingly, the case at bar presents no substantial federal question warranting the granting of petitioner's application for a writ of certiorari.

In the event that this Court determines that the factual pattern presented in the case at bar was not sufficiently critical to warrant the immediate arrest of this murder suspect without a warrant, we respectfully request that any decision on this petition be stayed until this Court's determination upon the reargument of Payton and Riddick.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Dated: Brooklyn, New York
July, 1979

Respectfully submitted,

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* The writer is indebted to Assistant District Attorney Adrian Mecz who prepared the brief submitted to the Appellate Division of the Supreme Court of the State of New York, Second Department.